BEFORE THE STATE OF CALIFORNIA
ENERGY RESOURES CONSERVATION AND DEVELOPMENT COMMISSION

In the Matter of: RULEMAKING TO MODIFY RULES OF PRACTICE AND PROCEDURE FOR POWERPLANT APPLICATIONS	Docket 02-SIT-1

COMMENTS OF THE INDEPENDENT ENERGY PRODUCERS ASSOCIATION ON POSSIBLE MODIFICATIONS TO CALIFORNIA CODE OF REGULATIONS, TITLE 20, SECTION 1230 ET SEQ., REGARDING COMPLAINTS AND INVESTIGATIONS, AND SECTION 1720.3 REGARDING CONSTRUCTION DEADLINES

The Independent Energy Producers Association ("IEP") is pleased to have the opportunity to comment on the Rulemaking to Modify Rules of Practice and Procedure for Powerplant Applications (Docket 02-SIT-1). IEP thanks the Energy and Infrastructure and Licensing Committee ("Committee") for its hard work in this proceeding to date and looks forward to continuing to work with the Committee on the proposed regulations.

Overview

Presently, the energy markets in California and across the nation are unsettled. At the same time, California faces a near-term need (years 2004-2005) for additional generation to meet the growing capacity and energy needs of Californians. Given these circumstances, initiating a Rulemaking on siting regulations will only serve to increase

uncertainty faced by generation developers and the financial markets that stand behind generation development. Thus, IEP remains unconvinced, particularly given the lack of strong evidence to the contrary, that changing the Commission's existing regulations will (1) improve the ability of the state to ensure that adequate electrical generating capacity is on-line in a timely manner; and (2) result in a more timely completion of certified projects than would otherwise occur. The changes may create additional uncertainties and hurdles to financing the development of new generation facilities. As a result, the proposed changes will likely increase the costs of financing existing projects and delay the on-line date for needed additional generation capacity.

Specifically, IEP notes the following concerns:

- **There Is No Evidence Supporting The Conclusion That A Threat Of License Revocation Will Speed Up Construction Of Projects**. It is counterintuitive to suggest that more powerplant projects will be built if more powerplant licenses are revoked. A license revocation results in just that, a revoked license, and nothing else. The Committee should not act in the absence of an administrative record supporting the position that revocation will speed up construction of licensed projects.

- **In Addition To Adverse Impacts On Certified Projects, The New Threat Of License Revocation Could Have A Chilling Affect On New Applications For Certification**. Development of a powerplant project is an expensive, multi-year process. The Committee should be concerned that placing new restrictions on the shelf life of a power plant license adds additional risk that may cause developers to reexamine plans to file new applications for certification. The proposed revisions to Section 1720.3 may exacerbate the current uncertainty by having a chilling effect on new applications for certification.

- **Revocation Threatens The Substantial Commitment Of Resources Expended By The State In Licensing The Project**. By the time a project is licensed, the State of California and the developer have both invested substantial resources in the licensing process. Revocation of the license would nullify the investment made by all parties, including the State.

In addition to the general comments provided above, IEP provides comments on the proposed regulatory changes to the Commission's existing siting regulations distributed to Workshop participants.

I. Comments on Proposed Changes To Article 4: Complaints and Investigations (Informal vs. Formal Complaints, Sections 1230 et seq.)

As stated at the May 1, 2002 workshop, IEP supports the concept of a streamlined review of potential complaint actions. While it is the Committee's intent to have one administrative process, IEP believes that the language of Section 1230.5, as proposed, would lead to two, duplicative appeals: (1) an informal appeal, resulting in a ruling that would be appealable to the full Commission; and (2) a formal appeal, resulting in a ruling that would be appealable to the full Commission. As presently drafted, the informal appeal process will simply result in greater delay and increased uncertainty as to a final determination of any complaint. Under this proposed procedure, parties will initiate an "up to" 60 day "informal complaint" procedure, the determination of which will be made by the Siting Committee. Committee decisions are at risk of being appealed to the full Commission, which suggests "up to" an additional 30 days to resolve the informal complaint process. Upon resolution of this informal process, all parties are still entitled to initiate a formal complaint under Section 1231. This will trigger an additional delay (up to 60 days, presuming appeals before the full Commission) in the final resolution of the complaint. The uncertainty of this approach will not enhance the timeliness of Commission decision-making.

At the May 1, 2002 hearing, the Committee and Staff appeared to be in agreement with IEP on the concept of a single appeal that avoids duplicative proceedings. Staff further stated that new language clarifying the Committee's intent would be forthcoming. IEP will review and comment upon the revised language.

Recommendation: The Commission should consider developing an effective procedural means for eliminating frivolous and unwarranted complaints without needlessly delaying the siting proceeding.

II. Comments on Proposed Changes to Section 1720.3 Construction and Operation Deadlines

IEP is concerned that the proposed changes to Section 1720.3 will not ensure that projects become operational in a timely manner, but rather will have the opposite effect of delaying project development, ultimately to the detriment of the public's interest. Specifically, IEP has the following observations and concerns about the proposed language:

1. Definitions of key terms are missing or ambiguous. The proposed language includes a number of terms that are undefined, yet which "trigger" actions under the proposal. For example, under subsection (a), a deadline is established for the "installation of concrete foundations for major project structures." Installation, concrete foundations, and project structures are undefined. Similarly, under subsection (b), "the Commission may order an extension deadline for good cause…" "Good cause", however, is undefined. In subsection (c), the deadline for the "commencement of commercial operation" is established at two years from

the installation of concrete foundations. No definition exists for the commencement of commercial operation.

Recommendation: Definitions need to be included where key terms are vague, ambiguous, or unclear.

2. **Discretion as to whether the Commission will grant an extension when "good cause" is shown undermines certainty in the regulatory process.** In sections (b) and (c), the Commission may grant an extension of time for good cause. This creates added uncertainty to the development process as developers will never be certain prior to a formal decision what constitutes "good cause" (see Comments on lack of definitions above), nor will the developer have any certainty that an act that falls within the definition of "good cause" will actually result in an extension of time.

Recommendation: The regulations should prescribe that when "good cause" is shown a reasonable extension of time will be granted.

3. **Delays due to administrative and/or judicial appeals should be defined *a priori* as "good cause" for delays.** Prudent developers are not expected to proceed on financing a project, "installing concrete," etc., if the Commission's certification remains appealable in either an administrative or judicial venue. Thus, the time period allowed to move toward construction milestones ought not begin until a developer can reasonably and prudently begin the process of moving toward construction.

Recommendation: The regulations should specifically provide that administrative and judicial appeals are "good cause" and the period for moving toward the milestone of construction begins upon the exhaustion of such appeals.

4. **Milestone for construction must be reasonable.** The milestone (a) "moving to construction" and (c) "becoming commercially operational" must be reasonable and flexible to account for changes in the business environment. For example, recent experience by developers suggest that two (2) years to move from construction to commercial operations is an exceedingly difficult task, and may not be workable in many areas in California.

Recommendation: The milestone for initiating construction ought to be at least two (2) years, with the potential for an additional year(s) upon request and showing of good cause by the applicant. The milestone for commercial operation ought to be at least two (2) years from initiation of construction of major project structure with the potential for an additional year(s) upon request and showing of good cause by the applicant.

5. **Revocation of project certificates/licenses may result in simply delaying the timely addition of new generation resources to the supply mix of California.** Project development certifications/licenses ought not to be revoked merely due to delays in project construction, particularly if revoking the project will not result in a "replacement" developer. In the absence of a replacement developer, then simply revoking the certification/license will ensure that the project will be delayed an additional two or more years as the original developer (or another developer) is required to initiate a new siting proceeding.

Recommendation: Revocation of a certification or license should not occur unless there is strong evidence that such revocation will result in additional generation becoming operational at the site within the same timeframe that the revoked project is expected to become operational.

6. If the public interest rests in the state removing/revoking a developer's certification/licenses (e.g. in instances when "hoarding" is occurring), then the standard for the exercise of this authority must be clear and demonstrable.

Revocation of a developer's license is an extraordinary act, particularly in light of the huge expenses faced by the developer (and the state) in moving through the Commission's regulatory siting process. Costs to developers often rise to multiple millions of dollars, not including the tremendous expenses of obtaining environmental offsets that can rise to the tens of millions of dollars. The state's costs in siting proceedings average $750,000. These are not frivolous amounts and represent the earnestness of the developer and the state in this endeavor. Prior to effectuating a revocation of a certification/license, the state ought to have the burden of showing that an abuse (e.g. hoarding) has occurred or is occurring. Further, the state ought to have the burden of showing that the new developer which plans to step into the shoes of the existing developer has demonstrated a willingness and capability to do so and compensate the original developer.

Recommendation: The State must clarify and fully prescribe the "Standard" that will be used to determine when and if a developer's project certification/license may be revoked. In addition to being reasonable, the "Standard" needs to include factors that are empirical and measurable, and thus provide the basis for reasoned decision making.

IEP appreciates the opportunity to comment on this important subject. We look forward to working with the Committee on this matter, if the Committee proceeds on developing and adopting language affecting the siting process.

Dated: May 15, 2002

Respectfully submitted,

/s/

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Independent Energy Producers Association